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Sovereign Immunity in the United States: An Analysis of S. 566†

The rules prevailing in the United States today on the subject of sovereign immunity are confusing to say the least. "At present the determination whether a foreign state which is sued in a court of the United States is entitled to sovereign immunity is made by the court in which the action is brought. However, the courts normally defer to the suggestion of the Department of State that immunity should be accorded and make their own determination of entitlement to immunity only when the Department of State makes no submission to the court."[1]

To create some semblance of order out of the chaos and to unburden the Department of State from the judicial function and political pressures of determining whether to submit a suggestion of immunity to the appropriate court the Departments of State and Justice jointly sponsored a bill designed to define the circumstances in which foreign states are immune from the jurisdiction of the United States courts and in which execution may not be levied on their assets. On January 26, 1973, that bill was introduced in the United States Senate by Senator Hruska.[2]

If the bill is enacted it will remove the Department of State from any involvement in claims of sovereign immunity and render determination of those claims a purely judicial function from which the courts will no longer be able to abdicate themselves. It will do this by establishing in Title 28, U.S.C. uniform standards for the determination of those claims. The purpose of this paper is to present a general outline of the bill and to point up several obvious problem areas for further reflection.

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[1]Transmital letter by the Attorney General and the Secretary of State, jointly, transmitting the draft sovereign immunity bill to the President of the Senate. See footnote 2.

[2]S. 566. A similar bill, S. 771, was introduced by Senator Fulbright.

At the outset, a number of points should be noted. First, the bill deals only with the sovereign immunity available to a foreign state and not with the personal immunities available to diplomatic agents and consular officers.[3] In this regard, Section 1603(a) would modify existing law by defining a "foreign state" to include (for most purposes) a political subdivision of that foreign state or an agency or instrumentality of such state or subdivision. Under the present law, an agency or instrumentality of the state is entitled to immunity but a political subdivision is not[4] and, *a fortiori,* neither is an agency or instrumentality of such subdivision. As to state owned corporations, the determination of whether they are such agencies or instrumentalities of the state as to be entitled to immunity turns on several factors, including place of incorporation, percentage of stock owned and manner in which it is treated for suit in its own country.[5] Presumably, although not explicitly stated, the same factors will be considered if the bill is enacted and will be equally relevant in determining whether a corporation is an agency or instrumentality of a political subdivision.

A second point to be noted is that while the bill is cast in terms of immunity from jurisdiction it is speaking of personal jurisdiction, the lack of which can be waived, rather than subject matter jurisdiction the lack of which cannot.[6] Further a claim of immunity can be raised only after the court acquires jurisdiction to hear the case and the bill also deals with the manner of obtaining such jurisdiction, *i.e.*, service of process.

Third, while the bill adopts the restrictive theory of immunity announced in the so-called "Tate Letter,"[7] it goes much further and puts teeth into a judgment by permitting execution against the assets of a foreign state—a procedure prohibited at present even in cases where the Tate Letter and the

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[3]Immunities of diplomatic and consular officials are governed by the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, to both of which the United States is a party.

[4]Restatement of the Foreign Relations Law of the United States, 2nd ed. (herein called "Restatement") §67 sets forth this rule despite a contrary holding in Sullivan v. State of Sao Paolo (36 F. Supp. 503, *aff'd* 122 F.2d 355) with respect to a federal state. In that case the state of Sao Paolo was likened to one of our own United States and since our own States enjoy immunity (Principality of Monaco v. Mississippi, 292 U.S. 313) the same should be applicable to a foreign federal state.

[5]See Hannes v. Kingdom of Roumania Monopolies Institute (260 App. Div. 189) for a full discussion.

[6]The bill will also add a new Section 1330 to Title 28 U.S.C., which section would give the United States district courts original jurisdiction, without the $10,000 jurisdictional amount, in suits against foreign states, political subdivisions thereof or agencies or instrumentalities of either. However, the new Section 1330 will not apply if the agency or instrumentality is a citizen of the United States under Section 1332(c) and (d) so that, in such cases, the jurisdictional amount will be required. Section 1332(c) and (d) applies to corporations. If the agency or instrumentality of the foreign state is an individual (See Rahimtoola v. Nizam of Hyderabad (England, House of Lords) [1957] Int'l L. Rep. 175) the jurisdictional amount would not be required.

[7]Letter of May 19, 1952 from the Acting Legal Advisor of the Department of State to the Acting Attorney General (26 Department of State Bulletin 984).

restrictive theory of immunity permit a suit to be maintained and brought to judgment.[8] It makes no difference that the assets are in the custody and control of the foreign state, thus overruling the rule enunciated in Section 68 of the Restatement.

The substance of the bill, after the declaration of purpose and the definitions, starts with a grant of immunity from jurisdiction (Section 1604), proceeds to establish five general exceptions to immunity (Section 1605), continues by dealing specifically with cases of public debt and counterclaims (Sections 1606 and 1607) and service of process (Section 1608) and concludes with three sections relating to immunity from execution and attachment and exceptions thereto (Sections 1609, 1610 and 1611).

Commercial Activity

The one general exception in Section 1605 which will probably generate the most interest will be the second enumerated one—the commercial activity exception. It rejects the classical absolute theory of immunity and adopts the newer restricted theory of sovereign immunity. Under the older absolute theory all activities carried on by a sovereign are "governmental activities" (even though they be of a commercial nature which might be carried on by a private individual) *e.g.*, a government owned merchant vessel[9] and, thus, comity precluded our courts from entertaining jurisdiction over the foreign state. After World War I a definite trend developed abroad toward a restricted theory of immunity, that is, immunity being available only with the respect to purely governmental activities (*acta jure imperii*) but not with respect to commercial activities (*acta jure gestionis*). In this country the trend culminated with the Tate Letter in 1952. Thereafter, the issue in each case became one of determining whether the particular activity was commercial or governmental.[10]

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[8]Weilamann v. Chase Manhattan Bank (21 Misc. 2d 1086) and New York & Cuba M.S.S. Co. v. Republic of Korea (132 F. Supp. 684).

[9]Berizzi Bros. Co. v. S. S. Pesaro (271 U.S. 562).

[10]In Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes (336 F.2d 354) the Court of Appeals for the Second Circuit noted that many commentators declared the distinction to be unworkable but since the Department of State drew a distinction the Court must do so, Republic of Mexico v. Hoffman (324 U.S. 30). In applying the restrictive theory it said:

> The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts. Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases. Since the State Department's failure or refusal to suggest immunity is significant, we are disposed to deny a claim of sovereign immunity that has not been "recognized and allowed" by the State Department unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive. Such acts are generally limited to the following categories:
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> (1) internal administrative acts, such as expulsion of an alien.
>
> (2) legislative acts, such as nationalization.

It was in this context that the Department of State got into the business of conducting miniature adversary proceedings in order to determine whether to enter a "suggestion" of immunity[11] which became binding on the court.[12]

The proposed law will change all this and relieve the Department of State of its self-created judicial role. Section 1605(2) provides that a foreign state shall not be immune from the jurisdiction of the courts in any case in which the action is based (a) upon a commercial activity carried on in the United States by the foreign state; or (b) upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (c) upon an act outside the territory of the United States in connection with a commercial transaction of the foreign state elsewhere and that has a direct effect within the territory of the United States. A "commercial activity" is defined in Section 1603(b) to mean "either a regular course of commercial conduct or a particular commercial transaction or act." Note that the bill defines generally a commercial activity in contradistinction to *Victory Transport* which defined generally a governmental activity. In determining whether an activity is commercial or governmental some foreign courts apply a test based on the nature of the transaction while others declare the test to be based on the purpose of the transaction. In accordance with the prevailing view, the bill adopts the nature of the transaction test by providing that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[13] The

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(3) acts concerning the armed forces.
(4) acts concerning diplomatic activity.
(5) public loans.

We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to international comity in other than these limited categories.

[11]See Restatement §71, Reporters' Note 1.

[12]Republic of Mexico v. Hoffman (324 U.S. 30, 35):

It is therefore not for the courts to deny an immunity which our government [executive branch through the Dept. of State] has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.

See also Rich v. Naviera Vacuba, S.A. (197 F. Supp. 710 *aff'd* 295 F.2d 24) and Chemical Natural Resources Inc. v. Rep. of Venezuela (215 A.2d 864 [Penna.]). However, in Ocean Transport Company, Inc. v. Republic of the Ivory Coast (269 F. Supp. 703) the court apparently did not consider itself *bound* by an executive determination. In Ocean Transport the State Department informed the Republic of the Ivory Coast that it was declining a request for recognition of sovereign immunity since the transaction was of a private nature. Despite the apparently unequivocal injunction in Republic of Mexico v. Hoffman that the courts defer to the executive branch, the court in Ocean Transport said at page 705:

Since the State Department has declined to recommend immunity, and since jurisdiction has been obtained by the attachment of defendant's property, we are only required to decide whether the instant act was one of a public or private nature. While I may not be bound by the State Department's finding that the contractual transaction involved in this case was private rather than public, it is highly persuasive and the authorities dictate that it must be given great weight. . . .

[13]In Holoubek v. United States, Supreme Court of Austria, 1961, the Court said:

. . . The distinction between an act under private law and an act of sovereignty will always be easy if one considers the following: . . . an act under private law may be assumed if the State performs

distinction between "nature" and "purpose" is simple to state but may be difficult to apply in actual practice, *e.g.*, purchase of boots for the Army.

As indicated earlier, there are three classes of transactions covered by the commercial activity exception. The first, based upon a commercial activity carried on in the United States, needs no extensive explanation. The second, relating to an act performed in the United States in connection with a commercial activity elsewhere, would be exemplified by a government owned airline selling a ticket in the United States for passage between two points outside the United States. The third, an act outside the United States in connection with a commercial activity elsewhere and which has a direct effect within the United States, would be exemplified by air or water pollution in the United States by a factory operated commercially by a foreign state.[14] The type of relief a United States court could or would grant in this third situation is not set forth and itself presents a fascinating study.[15]

Waiver of Immunity

Another exception to the immunity granted by Section 1604 exists in any case in which the foreign state has waived its immunity, either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arises. Note that under the bill a

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through its organs such activities as can also be performed by private persons. An act of sovereignty will always be assumed if the State performs an act on the basis of its sovereignty, be it an act of legislation or of administration (decree). Acts of sovereignty are acts where the equality of the two legal entities is absent and is replaced by the submission of one of them. Spruth (*Jurisdiction Over Foreign States*) has described this distinction in the following words: "To act as a sovereign State means to appear in the exercise of sovereignty rights. To enter into private agreements means to take a position equal to that of a private person." I Dahm, *International Law*, page 229, expresses this thought by saying it occurs when the State descends from its height and appears in legal forms [*sic*] and spheres which are on the level of the citizen.

It is thus always the act itself performed by the organs of the State which must be weighed, and not the motive or purpose. It must always be examined from what act of the State the claim derives. Whether the act in question was an act under private law or an act of sovereignty can always be derived from the nature of the occurrence, that means from the intrinsic character of the act or the legal relation resulting therefrom. . . .

[14]This example is taken from the Section-By-Section Analysis. Another would be that of tidal wave damages (if any) in South America caused by the A.E.C. underground nuclear tests at Amchitka might be an example of an act within this category as the tests were in large part related to research for peaceful uses, such as energy and engineering. (Reference to these tests is merely to set forth an example which comes to mind and not to enter the debate—either legal or moral—concerning them.) As to jurisdiction in the case of acts performed outside the United States, *see* U.S. v. Aluminum Company of America, 148 F.2d 416 (not a sovereign immunity case).

[15]Obviously, the court cannot grant injunctive relief against the sovereign.But can it do so against an agency of the sovereign, which agency may or may not be present here? If an action is brought for money damages based on environmental pollution, may it be brought as a class action [see Zahn v. International Paper Company (469 F.2d 1033) except for the issue as to jurisdictional amount which may not be applicable to this discussion—footnote 6 *supra*]? If so, suppose that the offender is a third world country the enforcement of a money judgment against which would substantially weaken its financial and economic infra structure. Would our courts permit that to occur? An even more basic question presents itself, applicability of the act-of-state doctrine. In this connection, see the discussion contained in the section "Other Exceptions to Immunity" herein.

waiver of immunity from suit is not a waiver of immunity from execution and attachment.[16] While Section 1610 does provide exceptions to such latter immunity its scope is not co-extensive with the Section 1605(1) exception to immunity from jurisdiction. This will be discussed subsequently.

In examining the paragraph dealing with waiver of immunity from suit we find that it embodies three separate subjects—express waiver, implied waiver and non-withdrawal of waiver.

Express waiver should present few problems. It can be a general waiver arising out of a multi-national convention[17] or other international agreement[18] or a specific waiver arising out of an agreement with a private contracting party.[19] The only issues will probably relate to whether the foreign state did or did not waive its immunity and the scope of the waiver.

Implied waiver will occur primarily in connection with commercial transactions and presents some problems under existing law and will continue to do so even if the bill is enacted. The bill simply does not set forth any guidance as to the factors from which waiver is to be implied and there are very few American cases dealing with the subject. Implied waiver would appear to be a relatively new and illusory concept despite the State-Justice explanation in the Section-By-Section Analysis which accompanied the transmittal letter and which says:

> Courts have also found an implicit waiver in cases where a foreign state agreed to arbitrate in another country or where it was agreed that the law of a particular foreign country should govern the contract.

While not citing cases, the authors of the analysis apparently were referring to *Victory Transport* which dealt with an arbitration agreement. Research has disclosed no United States case basing waiver of immunity on a choice of law clause in a private agreement. In *Victory Transport* the Court said that "implicit in the agreement to arbitrate is consent to enforcement of that agreement." But this would not support a doctrine of implied waiver since the arbitration agreement amounted to an express waiver.[20] Also, the foreign courts which found implied waivers of immunity required a clear showing that waiver was intended.

With respect to non-withdrawal of waiver the bill is adopting one of several divergent views, albeit the more prevalent one that a waiver cannot be

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[16]Neither is it under present law. See Restatement §69, Reporters' Note 2 for an extended discussion.

[17]I.B.R.D. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

[18]*E.g.*, Commercial Treaty with Italy, 1948, T.A.S. No. 1965.

[19]Victory Transport case, *supra*.

[20]In Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp. (25 Misc. 2d 299) the Court said at pages 304-305, without any citation of authority:
It may be that some of our domestic courts have hesitated to spell out an "implied waiver" of immunity from the fact alone that the sovereign has entered into a commercial contract. . . .

withdrawn after the claim arises. While the international trend appears to be moving in that direction the rule is not yet universal. In the British Commonwealth the rule is that the foreign state may withdraw the waiver before an actual submission to jurisdiction despite an agreement to submit to jurisdiction.[21]

Two things should be noted about non-withdrawal of waiver. First, the subject need only be considered in a case where immunity existed absent the waiver and not in one arising out of, for example, a commercial activity as to which there is no immunity. Second, the bill does not take a firm position as to an attempted withdrawal of waiver *before* the accrual of the cause of action.[22] The situation may occur with respect to contracts by which an American firm agrees to sell military hardware to a foreign government (after appropriate U.S. government approval). By reason of the "nature of the transaction" (military hardware sale) the agreement may be outside the commercial activities exception. If that be so, suppose that a foreign state contracts (containing an express waiver) with a munitions firm for long-term delivery of aircraft bombs. During the term of the contact the foreign state sends a letter to the munitions supplier in which it purports to withdraw its waiver of immunity. The munitions firm continues to supply the bombs and thereafter the foreign state breaches a term of the contract. Is the withdrawal of immunity effective and what are the firm's rights?[23]

Other Exceptions to Immunity

The third exception in Section 1605 denies immunity in cases where rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is used in connection with a commercial activity. Preliminarily, it should be noted that the term "foreign state" is used in Section 1605(3) in its literal sense as including only the central government despite the broader definition of that term in Section 1603(a)

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[21]In Kahan v. Pakistan Federation, [1951] 2 K.B. 1300, 1012, the Court said:

. . . I think it is established beyond question by authorities binding on this court that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction—a submission, as it has been termed, in the face of the court—will suffice. See also U.S.A. v. Republic of China, [1950] Int'l L. Rep. 168 (Sup. Ct. of Queensland, Australia).

[22]Presumably it would be allowed since the bill precludes it only after the claim arises. See also Hannes v. Kingdom of Roumania Monopolies Institute (260 App. Div. 189 at 200-202). However, the withdrawal of waiver might itself constitute a breach of the agreement and thereby give rise to a cause of action, although perhaps not enforceable. In order to protect the dignity of the sovereign and the rights of the private contracting party the courts could hold that upon the withdrawal of waiver the other party is given an option to terminate the agreement.

[23]If the courts adopt the possibility set forth in footnote 21 the withdrawal would be effective as of the time of the letter. The munitions firm having chosen to continue deliveries may be deemed to have accepted a new agreement having the same terms as the original except for omission of the waiver of immunity.

including a political subdivision or an agency or instrumentality of the state or subdivision and it is suggested that the language of the definition section be amended to exclude Section 1605(3) from its coverage. Disregarding the Section 1603(a) definition we find that Section 1605(3) draws distinction between (a) cases involving the central government and (b) those involving an agency or instrumentality of the central government or a political subdivision thereof.[24]

In cases involving the central government the exception is applicable if the property itself is present in the United States in connection with a commercial activity. On the other hand, if the property is owned by an agency or instrumentality of either the central government or of a political subdivision the confiscated property need not be physically present here so long as the agency or instrumentality is engaged in commercial activity here. The rationale is probably to equate an agency or instrumentality with an ordinary corporation since the former will probably have its own assets and operate as a separate entity analogous to a corporation. Note, however, that, if the property is here in a non-commercial capacity, the exception is not applicable and immunity is available. Also, the section has an *in rem* effect so as to deny immunity to a transferee state as well as the confiscating state. An example illustrating the two foregoing points would be one in which State X seizes a commercial vessel owned by a United States person. State X then delivers that vessel to State Y and receives a warship in return. The warship, now of State X, is damaged at sea and puts in at a United States port for repairs. Its presence here will not support the Section 1605(3) exception since the vessel would not be here in connection with a commercial activity.[25] Also, if the seized vessel, now of State Y, delivers a commercial cargo to a United States port, State Y may not assert immunity in a suit by the owner to recover possession.

An inherent practical problem arises from the inclusion in this exception of property exchanged for the confiscated property, *i.e.*, the problem of tracing. Does the exception apply only to property received in the first exchange? The language of Section 1605(3) would appear to require an answer in the affirmative although logic would dicate a contrary result. Also, can a sale of the confiscated property for currency or credits negate the non-availability of sovereign immunity to the confiscating state since neither the confiscated property nor property exchanged therefore would be present here?

Another point is worthy of note. The Section-By-Section Analysis which accompanied the State-Justice transmittal letter states that the bill in no way affects existing law concerning the extent to which, if at all, the act-of-state

[24]One possibility is not even mentioned in the bill—that of a political subdivision directly engaging in commercial activities.

[25]Query: If the commercial vessel, now of State Y, entered a United States port in connection with a commercial activity of State Y can the vessel be attached? Section 1605(3) does not specifically require that the confiscating state be the one engaged in the commercial activity here.

doctrine may be applicable in similar circumstances. This may or may not be as accurate as is blandly asserted. At present, a confiscating sovereign which is sued can assert sovereign immunity; if immunity is not available for any reason the out-of-state doctrine comes into play and the Hickenlooper Amendment[26] prohibits judicial abstention if "*a claim* of title or other right *to property is asserted.*" [Emphasis added.] This language has been construed to eliminate from the coverage of the Hickenlooper Amendment all contract claims, even when the contract rights were confiscated and are sought to be enforced here.[27] However, under the bill, Section 1605(3) denies immunity in cases "in which *rights in property* taken in violation of international law are in issue." [Emphasis added.] This would appear to be broader in scope than the quoted language of the Hickenlooper Amendment since it could be construed to include confiscated contract rights. The bill, then, might be construed as an implied extension of the Hickenlooper Amendment in suits against a confiscating or transfer state. This construction might result from a practical minded working judge not being disposed to draw the distinction between the bill's intent to confer jurisdiction on the court and the act-of-state doctrine being one of judicial abstention. The judge might simply conclude that since Congress enacted Section 1605(3) and gave the court jurisdiction to hear the case Congress meant for the court to hear it—thereby burying the vestiges of the act-of-state doctrine, at least to the extent that a state itself is being sued.[28]

The fourth exception in Section 1605 is really a combination of two separate ones. It applies to cases (a) in which property rights in the United States, acquired by succession or gift, are in issue, and (b) in which rights in immovable property situated in the United States are in issue. The portion of the exception dealing with the acquisitions by succession or gift requires little discussion—the bill's rationale being that in claiming such rights as beneficiary or donee the foreign state is claiming the same right which is enjoyed by private persons.[29]

With respect to rights in immovable property, the situation is not so simple. The present rule set forth in Section 68 of the Restatement is that immunity does not extend to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction." Comment "d" to that section provides that the foregoing rule

[26]U.S.C. 2370(e)(2).

[27]French v. Banco Nacional de Cuba (23 N.Y.2d 46).

[28]This speculation does not involve suits against a non-governmental transferee. On the one hand, it could be argued that if the bill is so construed as against a confiscating sovereign it should be similarly construed as against a transferee who should not have greater rights. On the other hand, it could be argued that the wrongdoer should be dealt with more harshly and that if Congress meant to modify the Hickenlooper Amendment Congress could easily have done so.

[29]The Section-By-Section analysis discloses that the framers of the bill used the term "succession" in the sense of devolution of title to property under the law of descent and distribution. There is no indication that they used the term in the context of state succession in the international law sense.

"does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." Thus, in an action by a landlord for unpaid rent and to recover possession he could apparently not recover the rent arrearages but only possession of the realty.[30] It would appear, however, that the bill goes further than current law in that the landlord could recover on both counts since the case is one in which "rights in immovable property situated in the United States are in issue." The introductory language to Section 1605 declares that the exception to immunity exists "in any case" in which rights to realty are in issue and does not appear to limit non-immunity to the cause of action to recover possession of the realty.

There is yet another facet to the immovable property exception. Suppose the leased premises were used for diplomatic or consular activities. In the Section-By-Section Analysis which accompanied the draft bill it is stated:

> It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, provides in Article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission are immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate on questions of ownership, rent, servitudes, and other similar matters, as long as the foreign state's possession of the premises is not disturbed.

However, since the language of the bill (by not excepting diplomatic or consular premises from its coverage) leads to a contrary conclusion, enactment of the bill would likely be contrary to the treaty and, as a later Congressional enactment, thereby supercede that provision of the treaty.[31] Such result is clearly inferable in light of Section 1605(5) which excepts from that exception cases in which a remedy is available under Article VIII of the NATO Status of Forces agreement.

The last exception to immunity in Section 1605 relates to actions for money damages arising out of negligence or wrongful act or omission of the foreign state or of any official or employee thereof. This exception, intentionally or not, closes a loophole in the Vienna Convention of 1961 on Diplomatic Relations. Under the personal immunities granted in that treaty, a diplomatic agent is immune from civil jurisdiction for his acts of negligence.[32] The bill does not

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[30]Hungarian People's Republic v. Cecil Associates, Inc. (118 F. Supp. 954) prohibits the collection of rent. The Restatement would permit recovery of the realty but the cases cited in Reporters' Notes "1" to Section 68 of the Restatement are all of foreign courts. Though they did not cite it, possibly because it is not an international law case, the authors of the Restatement may have relied on Land v. Dollar (330 U.S. 731) as persuasive, if not clearly authoritative.

[31]For a full discussion, see HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, pages 163-164 and footnotes thereto.

[32]Article 31 of the Vienna Convention of 1961 on Diplomatic Relations. To the contrary, however, consular officers and employees are liable for their negligence caused by a vehicle, vessel or aircraft (Vienna Convention of 1963 on Consular Relations, Article 43).

change that but merely substitutes the foreign state itself as the party from whom the damages may be sought.[33] As stated earlier, this exception is not applicable to cases in which a remedy is available under Article VIII of the NATO Status of Forces agreement.

Public Debt Of A Foreign State

Conceptually, the framers of the bill felt that a foreign state should continue to enjoy immunity from suit in any case relating to its public debt[34] and that the entire subject of public debt, with its own ramifications, should be treated separately from the basic grant of immunity (Section 1604) and the general exceptions thereto (Section 1606). To this end they created Section 1606.

Initially, it should be noted that while earlier sections of the bill use the term "foreign state" as including a political subdivision or an agency or instrumentality of the state or subdivision, immunity in cases relating to the public debt is available only to the central government. This is in accord with the general rule in this country (despite some contrary holdings) that a political subdivision is not entitled to immunity[35] and contrary to the existing rule that immunity extends to any governmental agency and to a corporation exercising functions comparable to those of an agency of the state.[36] Neither the covering letter by the Attorney General and the Secretary of State nor the Section By Section Analysis which accompanied the bill explain the reason for denying immunity to subdivisions, agencies or instrumentalities with respect to their public debt while allowing them general immunity under Section 1604. Lacking a suitable explanation, logic would dictate a contrary rule.

One area of difficulty in applying Section 1606 will be in the definition of "public debt." Wisely, the authors of the bill did not attempt to frame one. Rather, they would allow the courts to deal with individual situations as they arise. The Section-By-Section Analysis which accompanied the bill indicates that "public debt" would include direct bank loans as well as governmental bonds and securities sold to the general public through bond markets and stock exchanges. Logically, it would not include short term accounts payable for goods sold as this would emasculate Section 1605(2) which denies immunity in any case where the action is based upon a commercial activity. However, suppose the agreement calls for payment to be made over a five year period with the unpaid obligation to be evidenced by a note or bond. Would immunity be available under Section 1606 or unavailable by reason of Section 1605(2)?

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[33]Under current law immunity is not available to an insurer when the foreign state purchased liability insurance, Basner v. Andrews (72 Misc. 2d 228).

[34]For a discussion in support of the position that a foreign state should not be immune from suit on account of its public debts see Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S. 566*, 67 AMER. J. OF INT'L L. 745 (Oct. 1973).

[35]Footnote 4, *supra*.

[36]Restatement, §66.

Would the answer be different if the obligation were not evidenced by a note or bond?

Another area of difficulty may be found in Section 1606(b). That is a general exception to the entire chapter 97 which the bill would add to Title 28 of the United States Code. It provides that nothing in that chapter shall be construed as impairing any remedy afforded by the federal securities laws (15 U.S.C. 77(a) through 80(b)-21). Despite its broad scope that exception is most relevant to the public debt provision—Section 1606(a). Thus, in view of the broad definition of "security" and the expanding borders of Rule 10b-5, particularly the area of "materiality"[37] it is not hard to envision enterprising counsel seeking to avoid Section 1606(a) immunity by alleging a Rule 10b-5 violation due to a failure of the foreign state to disclose some theretofore secret economic, military or political plan. Would the American courts be required to pass on questions such as whether State A should have disclosed at the time it sold its bonds in the United States that it was negotiating a mutual defense pact with State B? Or should State C have disclosed that it had secretly transferred military hardware to State D for use in military actions against State E when American investors have substantial capital investments in State E? Further, if a court should find a securities act violation would it permit execution despite Section 1611 of the bill (see *infra*). Cogent arguments which need not be elaborated on here can be presented to support execution and immunity. The ramifications and political repercussions of Section 1606(b) are enormous and frightening.

In a practical sense Section 1606(b) is not necessary for the protection of investors, since foreign government obligations are, almost without exception, distributed by reputable bond houses and their registered representatives who can be enjoined from securities laws violations and are subject to liability for damages. Even when not distributed through traditional channels, statutory underwriters and distributors are not beyond the reach of the securities laws[38]—only the foreign government would be immune from suit. Still in a practical sense, Section 1606(b), if enacted, will have the potential to interfere and embarrass this country in its foreign relations and create additional problems for the courts. We certainly cannot expect foreign governments to sit idly by while our courts pry into their internal affairs in a Rule 10b-5 action. Will our courts try to avoid the inquiry by resort to some concept comparable to the state secrets doctrine? The Department of State would do well to reconsider the matter and suggest an amendment modifying or possibly even deleting Section 1606(b).

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[37]List v. Fashion Park, Inc. (340 F.2d 457); United States v. Affiliated Ute Citizens (406 U.S. 128).

[38]S.E.C. v. Chinese Consolidated Benevolent Assn. (120 F.2d 738).

Counterclaims

In the area of counterclaims against a foreign state (including subdivisions, agencies and instrumentalities), we are concerned with the balancing of conflicting principles. On the one hand, the doctrine of sovereign immunity is "one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign."[39] On the other, the courts are reluctant to permit "a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery."[40] The bill (Section 1607) attempts to strike the proper balance, and in doing so adopts the position taken in Section 70 of the Restatement.

Under the bill, separate rules apply depending on whether or not the counterclaim arises out of the transaction or occurrence that is the subject matter of the foreign state's claim. If it arises out of the same transaction or occurrence,[41] then there is no immunity with respect to the counterclaim; if it does not, immunity is denied only to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state. Thus, in the first case the defendant can recover a judgment on the counterclaim exceeding in amount the foreign state's principal claim. In the second case the defendant's different claim can be applied only as a set-off to prevent the foreign state plaintiff from recovering a judgment.

Two points should be noted. When a counterclaim is based upon a cause of action as to which sovereign immunity would not be available as a defense if it were the subject by a principal action by the defendant (*e.g.*, arising out of commercial activities or that the plaintiff is not an agency or instrumentality of a foreign state), the distinctions created in Section 1607 need not be considered.[42] Also, that section speaks of "counterclaims" but does not mention third-party claims and cross-claims. Presumably, although there is persuasive argument to the contrary, the general rules embodied in the other sections of the bill would be applicable.

Service Of Process

Section 1608 of the bill sets forth the manner of service of process on a foreign state (central government), a political subdivision and an agency or instrumentality thereof.[43] The current state of the law in this area is certainly

[39]National City Bank of N.Y. v. Republic of China (348 U.S. 356, 362).

[40]*Ibid*, at page 361.

[41]That question can itself present a substantial and difficult issue.

[42]Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp (25 Misc. 2d 299).

[43]This is the initial problem of bringing the defendant before the court. A foreign state, like a private litigant, need not appear and plead until after it has been served with process. Only after the foreign state has been served will it plead its sovereign immunity as a bar or, if immunity is not available, answer the complaint.

confusing and anomalous—attachment to obtain jurisdiction *in rem* or *quasi in rem* and then its release after judgment because of its immunity from execution, personal service of process on an ambassador being prohibited but service by mail being permitted,[44] etc. Under the bill these problems will not exist. Not only will the manner of service be settled, but the distinctions between actions *in personam, in rem* and *quasi in rem* will be eliminated. It might be said that the Section 1605 exceptions coupled with the Section 1608 manner of service is closely akin to the domestic concept of long-arm jurisdiction. Thus, attachment permitted by Section 1610 is for "purposes of execution" and not to obtain jurisdiction.[45]

The procedure for service set forth in Section 1608 calls for the defendant to be served in two different manners and requires that both be employed in each case. One manner, applicable in all cases, is to send two copies of the summons and complaint to the United States Secretary of State who will in turn transmit one copy by diplomatic note to the department of the foreign government charged with the conduct of its foreign relations. The second manner of service varies with the nature of the defendant. If the defendant is the state itself or a political subdivision, the plaintiff will deliver a copy of the summons and complaint to the clerk of the court to be mailed by him (registered or certified mail) to the ambassador or chief of mission of the foreign state. If the defendant is an agency or instrumentality, service may be made as in the case of a state or subdivision or by delivery to such other officer or agent as is authorized under the law of the foreign state or of the United States[46] to receive service of process in the particular case. To this reviewer, Section 1608 is not an exemplary model of legislative drafting. It is a single sentence comprising 22 lines, 234 words, 7 commas and no semicolons and badly in need of mechanical restructure. Finally, this section does not tell us when service of process is complete so as to start the 20-day time to answer. Even 20 days after the second service would hardly seem sufficient, especially in the case when the state itself is the defendant.

Execution and Attachment

It has long been the American view that assets of a foreign state are exempt from execution,[47] even though the foreign state was not immune from suit. The height of incongruity is illustrated by the current state of the law: in *in rem* cases, assets of the foreign state can be attached in order to obtain jurisdiction,

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[44]See Section-By-Section Analysis relating to Section 1608.

[45]Presumably, this would include attachment as a provisional remedy as authorized by F.R.C.P. 64

[46]The Section-By-Section Analysis suggests that agencies or instrumentalities may be served pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[47]*See* footnote 16.

but are exempt from execution after the judgment is obtained. The pending bill is designed to give teeth to the judgment, while at the same time protecting the vital interests of the foreign state.

Section 1609 asserts the basic premise that the assets of a foreign state (including a political subdivision and an agency or instrumentality of the state or subdivision) are immune from execution. Section 1610 establishes exceptions to that immunity and Section 1611 designates two classes of assets which continue immune despite Section 1610.

Section 1610 has different rules depending upon whether the defendant is (a) a state or political subdivision or (b) an agency or instrumentality of the foregoing. In a case against a defendant in the former category, only the assets used for a particular commercial activity are not immune and, even then, only if the attachment or execution relates to a claim based on that particular commercial activity. Thus, if the foreign state or political subdivision is engaged in more than one commercial activity only those assets used in the particular activity giving rise to the claim may be seized.[48] In the case of a defendant in the latter category, the assets are not immune if the attachment or execution relates to a claim which is based upon a commercial activity in the United States. Thus, if an agency or instrumentality is engaged in more than one commercial activity the assets of all such activities may be attached or subject to execution on a claim arising out of any one of such activities. The rationale for the difference in treatment is that each agency or instrumentality will probably have its own assets and will act as a separate entity, analogous to an American corporation.[49] Also, assets taken in violation of international law and present here in connection with a commercial activity will be subject to execution.[50]

In addition to the foregoing non-immunity rules, any state, subdivision, agency or instrumentality may expressly or impliedly waive immunity. Much of the discussion of waiver of jurisdictional immunity under Section 1605(1), set forth earlier, is applicable here.

As stated earlier, under Section 1611 two classes of assets continue to be immune from attachment and execution despite Section 1610. The first enumerated class consists of assets of a foreign central bank or monetary authority held for its own account. The purpose of this exemption is to encourage the holding of dollars in the United States by foreign states,

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[48]The sponsors of the bill opt for this rule rather than one permitting execution of any state assets which are used in any commercial activity in the United States. Execution on any commercial activity assets is far different from execution on governmental activity assets such as embassy furniture, etc.

[49]See the Section-By-Section Analysis for a full discussion of the factors underlying the sponsors' suggestion of different treatment of an agency or instrumentality than for a state or subdivision.

[50]Query: What about the act of state doctrine which is an American rule of abstention and not a rule of international law? Adherence to the act of state doctrine, even as modified by the second Hickenlooper Amendment, would negate this aspect of Section 1610.

particularly when we have an adverse balance of payments. The second class consists of assets which are used or so intended in connection with a military activity and which are (a) of a military character or (b) under the control of a military authority or defense agency. Note that these two sub-classes are stated in the disjunctive. Assets of a military character (bombs, tanks, etc.) are exempt regardless of under whose control they repose. The purpose of exempting this military hardware is to avoid embarrassment to the United States in connection with their purchase here by a foreign state. So-called supporting assets such as food, clothing, fuel, etc. needed for a military operation are exempt if they are under the control of a military or defense agency. The Section-By-Section Analysis makes clear that assets will be protected only if present or future use is military and gives the example that surplus military equipment withdrawn from military use would not be protected.

What Next?

The penultimate paragraph of the transmittal letter alerts us to further intended changes. It states:

> The Department of State contemplates that if the draft bill should be enacted, it will propose that the United States file a declaration accepting the compulsory jurisdiction of the International Court of Justice, on condition of reciprocity, with respect to disputes concerning the immunity of foreign states. The resolution of disputed questions of sovereign immunity by the World Court would have the beneficial effect of assuring that the law and practice of this and other countries conform with international law and of imparting further precision to the law in areas where some measure of uncertainty now exists.

Admirable as this goal may be, the suggested manner of accomplishment will most likely be unpalatable to many American legal thinkers. In fact (more accurately "in law") it may be unconstitutional. Article III, Section 1 of the Constitution provides that:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2 provides in part that:

> The judicial Power shall extend to all Cases, . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Without an extended discussion of constitutional law it would appear that reference of a matter to the International Court of Justice would deprive an American citizen of his right to have the United States Supreme Court be the final arbiter of an action brought in the courts of the United States or even whether it might be brought in the courts of the United States (including state courts) at all. Such deprivation might violate the Fourth Amendment to the Constitution.

Another problem rears its ugly head. Suppose the pending bill is enacted and thereafter the United States does accept the compulsory jurisdiction of the International Court of Justice on a sovereign immunity issue. Has an aggrieved American plaintiff had his property taken for a public use ("assurance that the law and practice of this and other countries conform with international law") without just compensation as prohibited by the Fifth Amendment? Even worse, will the entire concept of sovereign immunity be eventually held as violating the just compensation clause? Let us also reflect on this. If, under present law, the Department of State files a suggestion of immunity, can the United States be brought into the case as an additional defendant or substituted as a party defendant[51] in order to compel the United States to make just compensation for destroying the plaintiff's right to recover a judgment against the foreign state?[52]

Conclusion

The doctrine of sovereign immunity has always been beset with problems and uncertainties and so, perhaps, the ones discussed earlier were to be expected. Other commentators, examining the bill from other vantage points, will undoubtedly point up others. On balance, however, the mere introduction of the bill is a long step forward. It is a recognition by the Department of State that the outcome of a lawsuit should be determined by the judicial branch of our government based upon rules of law and not by the executive branch based upon its own notion of what may be politically or diplomatically expedient in the circumstances.[53]

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[51]Disregarding for this discussion the procedural issue of whether there must be a separate plenary action in the Court of Claims.

[52]For a thorough and far-ranging analysis, see Henkin, *Foreign Affairs and the Constitution*, pages 259-66.

[53]See for example Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, in which the Department of State filed a suggestion of immunity contrary to the intent of the Tate Letter. In response to this argument the District Court stated at 197 F. Supp. at 724 that "no policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive. Flexibility, not uniformity, must be the controlling factor in the time of strained international reltions." At 41 N.Y.U. LAW REVIEW 62 (March, 1966), it is reported that the Solicitor General's memorandum in opposition to Rich's petition for certiorari stated:

> That [Tate] letter does set forth the considerations which the Department will take into account in determining whether or not to recognize a claim of immunity by a foreign sovereign. But is wholly and solely a guide to the State Department's own policy, not the declaration of a rule of law or even of an unalterable policy position; and, in addition, it sets forth only some of the governing considerations and does not purport to be all-inclusive or exclusive.

Appendix

93D CONGRESS
1ST SESSION

S. 566

IN THE SENATE OF THE UNITED STATES

January 26, 1973

Mr. Hruska (for himself and Mr. Scott of Pennsylvania) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may not be levied on their assets, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28, United States Code, is amended—

(1) by inserting after chapter 95 the following new chapter:

"Chapter 97—Jurisdictional Immunities of Foreign States

"Sec.
"1602. Findings and declaration of purpose.
"1603. Definitions.
"1604. Immunity of foreign states from jurisdiction.
"1605. General exceptions to the jurisdictional immunity of foreign states.
"1606. Immunity in cases relating to the public debt of a foreign state.
"1607. Counterclaims.
"1608. Service of process in United States district courts.
"1609. Immunity from execution and attachment of assets of foreign states.
"1610. Exceptions to the immunity from execution of assets of foreign states.
"1611. Certain types of assets immune from execution.

"§1602. *Findings and Declaration of Purpose*

"The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by United States courts in conformity with these principles as set forth in this chapter and other principles of international law.

"§1603. *Definitions*

"(a) For the purposes of this chapter, other than sections 1608 and 1610, a 'foreign state' includes a political subdivision of that foreign state, or an agency or instrumentality of such a state or subdivision.

"(b) For the purposes of this chapter, a 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

"§1604. *Immunity of Foreign States from Jurisdiction*

"Subject to existing and future international agreements to which the United States is a party, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in this chapter.

"§1605. *General Exceptions to the Jurisdictional Immunity of Foreign States*

"A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by *implication*, nothwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose;

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act has a direct effect within the territory of the United States;

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state or of a political subdivision of the foreign state and such agency or instrumentality is engaged in a commercial activity in the United States;

"(4) in which rights in property in the United States, acquired by succession or gift, or rights in immovable property situated in the United States are in issue; or

"(5) in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, caused by the negligent or wrongful act or omission in the United States of that foreign state or of any official or employee thereof except that a foreign state shall be immune in any case under this paragraph in which a remedy is available under article VIII of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces.

"§1606. *Immunity in Cases Relating to the Public Debt of a Foreign State*

(a) A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to its public debt, except if—

"(1) the foreign state has waived its immunity explicitly, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose; or

"(2) the case, whether or not falling within the scope of section 1605, relates to the public debt of a political subdivision of a foreign state, or of an agency or instrumentality of such a state or subdivision.

"(b) Nothing in this chapter shall be construed as impairing any remedy afforded sections 77(a) through 80(b)-21 of title 15, United States Code, as amended, or any other statute which may hereafter be administered by the United States Securities and Exchange Commission.

"§1607. *Counterclaims*

"In any action brought by a foreign state in a court of the United States or of any State, the foreign state shall not be accorded immunity with respect to—

"(1) any counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(2) any other counterclaim that does not claim relief exceeding in amount or differing in kind from that sought by the foreign state.

"§1608. *Service of Process in United States District Courts*

"Service in the district courts shall be made upon a foreign state or a political subdivision of a foreign state and may be made upon an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of the United States as defined in section 1332 (c) and (d) of this title by delivering a copy of the summons and complaint by registered or certified mail, to be addressed and dispatched by the clerk of the court, to the ambassador or chief of mission of the foreign state accredited to the Government of the United States, to the ambassador or chief of mission of another state then acting as protecting power for such foreign state, or in the case of service upon an agency or instrumentality of a foreign state or political subdivision to such other officer or agent as is authorized under the law of the foreign state or the United States to receive service of process in the particular case, and, in each case, by also sending two copies of the summons and of the complaint by registered or certified mail to the Secretary of State at Washington, District of Columbia, who in turn shall transmit one of these copies by a diplomatic note to the department of the government of the foreign state charged with the conduct of the foreign relations of that state.

"§1609. *Immunity from Execution and Attachment of Assets of Foreign States*

"The assets in the United States of a foreign state shall be immune from attachment and from execution, except as provided in section 1610 of this chapter.

"§1610. *Exceptions to the Immunity from Execution of Assets of Foreign States*

"(a) The assets in the United States of a foreign state or political subdivision of a foreign state, to the extent that they are used for a particular commercial activity in the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that foreign state or political subdivision if—

"(1) such attachment or execution relates to a claim which is based on that commercial activity or on rights in property taken in violation of international law and present in the United States in connection with that activity, or

"(2) the foreign state or political subdivision has waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, notwithstanding any purported withdrawal of the waiver after the claim arose.

"(b) The assets in the United States of an agency or instrumentality or a foreign state or of an agency or instrumentality of a political subdivision of a foreign state, which is engaged in a commercial activity in the United States, or does an act in the United States in connection with such a commercial activity elsewhere, or does an act outside the territory of the United States in connection with a commercial activity elsewhere and the act has a direct effect within the territory of the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that agency or instrumentality if—

"(1) such attachment or execution relates to a claim which is based on a commercial activity in the United States or such an act, or on rights in property taken in violation of international law and present in the United States in connection with such a commercial activity in the United States, or on rights in property taken in violation of international law and owned or operated by an agency or instrumentality which is engaged in a commercial activity in the United States; or

"(2) the agency or instrumentality or the foreign state or political subdivision has waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, notwithstanding any purported withdrawal of the waiver after the claim arose.

"§1611. *Certain Types of Assets Immune from Execution*

"Notwithstanding the provisions of section 1610 of this chapter, assets of a foreign state shall be immune from attachment and from execution, if—

"(1) the assets are those of a foreign central bank or monetary authority held for its own account; or

"(2) the assets are, or are intended to be, used in connection with a military activity and

"(a) are of a military character, or

"(b) are under the control of a military authority of defense agency."; and

(2) by inserting in the analysis of part IV,

"Jurisdiction and Venue," of that title after "95. Customs Court.",

the following new item: "97. Jurisdictional Immunities of Foreign States.".

SEC. 2. Chapter 85 of title 28, United States Code, is amended—

(1) by inserting immediately before section 1331 the following new section:

§1330. *Actions Against Foreign States*

"(a) The district courts shall have original jurisdiction of all civil actions, regardless of the amount in controversy, against foreign states or political subdivisions of foreign states, or agencies or instrumentalities of such a state or subdivision, other than agencies or instrumentalities which are citizens of a State of the United States as defined in section 1332 (c) and (d) of this title.

"(b) This section does not affect the jurisdiction of the district courts of the United States with respect to civil actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State

of the United States, as defined in section 1332 (c) and (d) of this title."; and

(2) by inserting in the chapter analysis of that chapter before—

"1331. Federal question; amount in controversy; costs."

the following new item:

"1330. Actions against foreign states.".

SEC. 3. Section 1391 of title 28, United States Code, is amended by adding a new subsection (f), to read as follows:

"(f) A civil action against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title may, except as otherwise provided by law, be brought in a judicial district where: (1) a substantial part of the events or omissions giving rise to the claim occurred, or (2) a substantial part of the property that is the subject of the action is situated, or (3) the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality, or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision. Nothing in this subsection shall affect the venue of actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."

SEC. 4. Section 1441 of title 28, United States Code, is amended by adding a new subsection (d), to read as follows:

"(d) Any civil action brought in a State court against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, may be removed by the foreign state, subdivision, agency or instrumentality to the district court of the United States for the district and division embracing the place where such action is pending. Nothing in this subsection shall affect the removal of actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."

SEC. 5. Section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

"(2) citizens of a State and citizens or subjects of a foreign state; and

"(3) citizens of different States and in which citizens or subjects of a foreign state or additional parties."